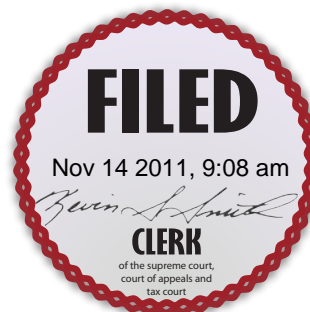


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CHARLES MULLEN,	)	
	)	
Appellant- Petitioner,	)	
	)	
vs.	)	No. 49A02-1012-PC-1415
	)	
STATE OF INDIANA,	)	
	)	
Appellee- Respondent,	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Linda E. Brown, Judge  
Cause No. 49F10-8803-CM-29647

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**November 14, 2011**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**ROBB, Chief Judge**

### Case Summary and Issues

In 1987, Charles Mullen pleaded guilty to operating while intoxicated, a Class C misdemeanor. In 2010, Mullen petitioned for post-conviction relief, and the trial court denied his petition. Mullen raises two issues for our review, which we restate as whether the factual basis presented to the trial court in Mullen's guilty plea and sentencing hearing was sufficient for the trial court to accept his plea, and whether Mullen is estopped from seeking post-conviction relief. Concluding the factual basis is sufficient, we need not reach the State's argument that Mullen is estopped from seeking post-conviction relief. Accordingly, we affirm the trial court's denial of Mullen's petition for post-conviction relief.

### Facts and Procedural History

In November of 1987, Officer Gary Newbold of the Indianapolis Police Department responded to a report of a vehicle collision on South Meridian Street after a car struck a parked vehicle. Officer Newbold encountered two people at the scene, Mullen and Jayne Diekhoff. Officer Newbold was informed that Diekhoff was driving the vehicle when the accident occurred. Diekhoff was arrested and charged with operating a vehicle while intoxicated ("OVWI"). Mullen was also arrested and charged with public intoxication because he appeared intoxicated, smelled of alcohol, and displayed slurred speech, blood-shot eyes, and unsteady balance.

A few days after the accident, Mullen went to the police and confessed that he had been driving the vehicle on the night of the accident. Diekhoff's charge was dismissed, and Mullen pleaded guilty and was convicted of operating while intoxicated as a Class C misdemeanor. Prior to accepting Mullen's guilty plea, the trial court explained his rights

and Mullen confirmed that he had read and voluntarily signed the trial court's waiver of rights form after discussing the form with his attorney. After reading the charge, the trial court asked Mullen if anyone forced him to plead guilty, and he said no. The trial court heard testimony from the arresting officer, Officer Newbold, and accepted Mullen's guilty plea.

In 2001 and 2010, Mullen was convicted of two more driving under the influence of alcohol offenses. He then filed his Petition for Post-Conviction Relief, alleging that during his 1987 guilty plea hearing his due process rights were violated, his plea was not voluntarily and intelligently made, and a factual basis did not exist for his guilty plea. The trial court denied Mullen's petition for Post-Conviction Relief. Mullen now appeals.

#### Discussion and Decision

A post-conviction relief petitioner must establish the grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1, § 5. To succeed on appeal from the denial of relief, a post-conviction petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court. Johnson v. State, 832 N.E.2d 985, 991 (Ind. Ct. App. 2005), trans. denied. The factual basis of a guilty plea need not be established beyond a reasonable doubt, but only requires evidence about the elements of the crime from which a trial court could reasonably conclude that the defendant is guilty. Dewitt v. State, 755 N.E.2d 167, 172 (Ind. 2001). Relatively minimal evidence can be adequate. Id. Further, to be entitled to post-conviction relief, the defendant must prove that he was prejudiced by the lack of a factual basis. Id.

Mullen first argues the factual basis for his guilty plea was insufficient. After the trial court discussed the ramifications of pleading guilty with Mullen and allowed him to choose between two options regarding the manner and length of time for his driver's license probation, the trial court asked "[d]o you still want to give up all these rights and plead guilty?" Exhibit Book, Petitioner's Exhibit 1 at 7. Mullen responded, "[y]es." Id. The trial court then asked, "did anyone force you to plead guilty to the charge which reads that on or about November 7, 1987 [sic] Charles Mullen operated a vehicle on South Meridian Street, Marion County, Indiana with ten hundredths percent of a weight of alcohol in Charles T. Mullens [sic] blood. Did anyone force you to plead guilty to this charge?" Id. at 8. Mullen responded, "[n]o." Id.

The trial court then heard testimony from Officer Newbold:

On 11/7/87 approximately 0032 hours after 8 I was radioed to investigate a property damage accident [sic] 2300 block of South Meridian Street. Upon my arrival I observed a vehicle that had struck another vehicle but was parked. The striking vehicle was a 1986 red Chevrolet Camaro [sic]. The driver that evening identified herself as Jayne Diekoff [sic], owner and operator of the Camaero [sic]. Consequently, she was arrested that evening for Operating a Motor Vehicle under the Influence of Liquor; and since that time Charles Mullen has come forward to – he was a passenger in that vehicle, or we assume he was that night. He has come forward now to admit that he was the driver, so since then I have filed the Operating charge on him.

Exhibit Book, Petitioner's Ex. 1 at 9. The trial court asked Mullen if what Officer Newbold stated was "essentially what happened," and Mullen said "[y]es." Id. The trial court then asked Mullen if he was "satisfied with the terms of the plea agreement," and Mullen responded, "[y]es." Id.

Mullen contends the factual basis presented at the guilty plea and sentencing hearing was insufficient because no evidence was presented showing he failed a blood or

breath test on the evening of the incident. Trial court determinations of adequate factual basis are reviewed on appeal with a presumption of correctness and only for abuse of discretion. Oliver v. State, 843 N.E.2d 581, 588 (Ind. Ct. App. 2006), trans. denied. An adequate factual basis for the acceptance of a guilty plea may be established in several ways: 1) by the State's presentation of evidence on the elements of the charged offense; 2) by the defendant's sworn testimony regarding the events underlying the charges; 3) by the defendant's admission of the truth of the allegations in the information read in court; or 4) by the defendant's acknowledgment that he understands the nature of the offenses charged and that his plea is an admission of the charges. Id.

As we stated in Oliver, "[o]ur supreme court has held that a defendant's admission of guilt after hearing a recitation of the charges against him can be a sufficient factual basis." Id. (citing Lowe v. State, 455 N.E.2d 1126, 1129 (Ind. 1983)). We conclude Mullen knew the charge against him and admitted his guilt, and, thus, there was a sufficient factual basis for the trial court's acceptance of his guilty plea. Mullen told the trial court he wished to plead guilty and waive his rights associated with trial. He knew the charge against him because it was read aloud by the trial court during the hearing. He confirmed Officer Newbold's testimony that he was driving on the night of the incident instead of Diekhoff, who was originally charged. And Mullen told the trial court he was satisfied with the terms of his plea agreement. Taken as a whole, Mullen impliedly admitted his guilt after a recitation of the charges against him, and the factual basis was sufficient for the trial court to accept his guilty plea.

Even if the factual basis for the trial court's acceptance of Mullen's guilty plea was insufficient, he has not shown he was prejudiced because he has failed to present

evidence establishing his innocence or that he would not have pleaded guilty had a more extensive factual basis inquiry been undertaken. See State v. Eiland, 723 N.E.2d 863, 864 (Ind. 2000) (affirming the Court of Appeals' conclusion that prejudice must be established before post-conviction relief can be granted for failure to establish a factual basis for a guilty plea). Mullen asserts first that because he did not take a blood or breath test he could not have been guilty. While this fact may have made the State's burden difficult to carry at trial if Mullen had not pleaded guilty, it does not effectively establish that Mullen was not driving while intoxicated on the night of the incident.

Mullen next contends that if an adequate factual basis inquiry was undertaken, he would not have pleaded guilty. If Mullen presented evidence supporting this contention, it would become relevant to our determination of whether he was prejudiced. It is not enough, however, to simply claim in a petition for post-conviction relief or on appeal that he would not have pleaded guilty and is thus prejudiced. See State v. Eiland, 707 N.E.2d 314, 317 (Ind. Ct. App. 1999) (judgment and opinion adopted and incorporated in Eiland, 723 N.E.2d at 865). Mullen thus failed to meet his burden of showing he was prejudiced by the allegedly insufficient factual basis presented to the trial court during his guilty plea and sentencing hearing.

### Conclusion

The factual basis for the trial court's acceptance of Mullen's guilty plea was sufficient. Mullen impliedly admitted his guilt to operating while intoxicated. We therefore affirm the trial court's denial of Mullen's petition for post-conviction relief.

Affirmed.

NAJAM, J., and CRONE, J., concur.